IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

IN RE: EQUIFAX, INC. CUSTOMER DATA SECURITY BREACH LITIGATION	Case No. 1:17-MD-2800-TWT 1:17-CV-3463-TWT 1:18-CV-317-TWT
	September 26, 2018 11:00 a.m. Atlanta, Georgia

\- - -

TRANSCRIPT OF THE STATUS CONFERENCE PROCEEDINGS
BEFORE THE HONORABLE THOMAS W. THRASH, JR.
U.S. DISTRICT COURT JUDGE

\- - -

Proceedings recorded by mechanical stenography and computer-aided transcript produced by

WYNETTE C. BLATHERS, RMR, CRR
Official Court Reporter
2314 U.S. Courthouse
75 Ted Turner Drive, SW
Atlanta, Georgia 30303
(404) 215-1547
wynette_blathers@gand.uscourts.gov

APPEARANCES OF COUNSEL:

On behalf of the Plaintiffs (MDL Litigation):

Kenneth S. Canfield
Doffermyre Shields Canfield & Knowles, LLC

Joseph P. Guglielmo
Scott & Scott, Attorneys at Law, LLP

Norman E. Siegel
Stueve Siegel Hanson, LLP

Stephen J. Kane
City of Chicago, Dept. of Law

On behalf of the Defendant (MDL Litigation):

David Lewis Balser
Phyllis Buchen Sumner
Sidney Stewart Haskins, II
King & Spalding, LLP

On behalf of the Plaintiffs (Securities Litigation):

James Harrod
Bernstein Litowitz Berger & Grossmann, LLP

Gary F. Lynch
Carlson Lynch Sweet & Kilpela & Carpenter, LLP - PA

Amy E. Keller
DiCello Levitt & Casey

On behalf of the Defendant (Securities Litigation):

Michael R. Smith
King & Spalding, LLP

B. Warren Pope
King & Spalding, LLP

APPEARANCES OF COUNSEL: (Cont'd)

On behalf of the Plaintiffs (Derivative Litigation):

Joseph H. Weiss (Telephonically)
WeissLaw, LLP

Joshua M. Rubin
WeissLaw

On behalf of the Defendants (Derivative Litigation):

David M. Chaiken
Troutman Sanders, LLP

April Elliott
Wilmer Hale, LLP

Scott Sherman
Nelson Mullins

Wednesday Morning Session

September 26, 2018

11:00 a.m.

- - -

P R O C E E D I N G S

COURTROOM DEPUTY: All rise. United States District Court for the Northern District of Georgia is now in session, the Honorable Thomas Thrash presiding.

THE COURT: Thank you. Be seated. All right. This is the case of In Re: Equifax Customer Data Security Breach Litigation, Case No. 17-MD-2800; In Re: Equifax, Inc. Derivative Litigation, Case No. 18-CV-317; and In Re: Equifax Securities Litigation, Case No. 17-CV-3463.

This is a status conference being held at my request. First, let me ask counsel for the parties who expect to actually participate in the status conference today to identify yourself by name and the party you represent.

MR. CANFIELD: Good morning, your Honor. I'm Ken Canfield, co-lead counsel for plaintiffs in the consumer track.

THE COURT: Good morning, Mr. Canfield.

MR. SIEGEL: Good morning, your Honor. Norman Siegel, co-lead counsel for the consumer track.

THE COURT: Good morning, Mr. Siegel.

MR. BALSER: Good morning, your Honor. David Balser

on behalf of Equifax.

THE COURT: Good morning, Mr. Balser.

MS. SUMNER: Good morning, your Honor. Phyllis Sumner on behalf of Equifax.

THE COURT: Good morning, Ms. Sumner.

MR. HASKINS: Good morning, your Honor. Stewart Haskins also on behalf of Equifax.

THE COURT: Good morning, Mr. Haskins.

MR. LYNCH: Your Honor, good morning. Gary Lynch on behalf of financial institution plaintiffs.

THE COURT: Good morning, Mr. Lynch.

MR. GUGLIELMO: Good morning, your Honor. Joseph Guglielmo with Scott & Scott, co-lead counsel for the financial institution plaintiffs.

THE COURT: Good morning, Mr. Guglielmo.

MR. KANE: Your Honor, Steve Kane on behalf of the City of Chicago.

MR. HARROD: Your Honor, James Harrod, lead counsel for plaintiffs in the securities action. Good morning.

MR. RUBIN: Good morning, your Honor. Joshua Rubin of WeissLaw on behalf of the lead derivative plaintiffs. Mr. Weiss is out of the country, and he's appearing by telephone.

THE COURT: Your name again, sir?

MR. RUBIN: Joshua Rubin.

THE COURT: Good morning, Mr. Rubin, Mr. Weiss.

MR. WEISS: Good morning, your Honor. I appreciate the opportunity to participate by telephone. I'm sorry I can't be there in person. Hopefully it's never going to happen again, but I am out of the country and I just couldn't make it.

THE COURT: I understand, Mr. Weiss.

MR. POPE: Good morning, your Honor. Warren Pope on behalf of Equifax and certain individual defendants in the securities litigation and the derivative litigation.

MR. CHAIKEN: Good morning, your Honor. David Chaiken, Troutman Sanders, on behalf of Richard Smith in the securities class action and shareholder of the derivative litigation.

MS. ELLIOTT: April Elliott, WilmerHale, on behalf of Ms. Stock in the derivative action.

MR. SHERMAN: Scott Sherman from Nelson Mullins also on behalf Elane Stock in the derivative action.

THE COURT: All right. Unless somebody feels very strongly that this is not the appropriate thing to do, my intention was to hear from counsel in the MDL case first, then the derivative case, and then finally the securities litigation. Mr. Canfield.

MR. CANFIELD: Your Honor, the first item on the agenda is the status of the motions to dismiss and the

scheduling of oral argument, assuming the Court wants us to present oral argument.

The parties have discussed the issue and the last brief -- we're assuming that the Court wants to hear argument in the motions to dismiss, in the consumer track, the financial institutions track in the small business case all at the same time. The last brief is scheduled to be filed on November 1st. The Court will obviously need some time to read all this paper that's being filed and to digest it, and then depending on how long the Court needs for that process, the parties are prepared to present argument.

Our joint proposal to the Court is that in the consumer track and in the financial institutions track each side would get one hour to argue their positions, and then with regard to the small business complaint, each side would take a half an hour. And then with regard to the day that the oral argument would occur, our proposal is that the Court figure out the time frame that the argument should take place, provide us with some available dates on the Court's schedule, and the parties will coordinate to pick a date that works for us as well as for the Court.

THE COURT: Well, Mr. Canfield, there are conflicting considerations at work here. Number one, I do frequently find oral argument to be helpful to me. Sometimes it can even change the outcome rather drastically. So from that

standpoint, I would certainly be inclined to schedule oral argument if the parties want it. The competing consideration is that having to schedule oral argument in a case like this where it's going to be lengthy and where so many people are involved, that can actually delay in getting out an order.

And for all the reasons that you've outlined in your letter here, I don't think the plaintiffs feel that a delay is in their interest. And you may or may not know I've tentatively scheduled the trial in *Androgel* to start February 25th, and we've blocked out three weeks for that. And I've got this enormous, enormous Gangster Disciples RICO case that I've got to try some time next year. So next year is already a train wreck, and we're not even in it yet.

MR. CANFIELD: Well, Judge, I'm here to present a joint proposal, so I can't speak for everybody in terms of whether the collective wisdom is to ask for oral argument or -- withdraw a request for oral argument or not. What I would suggest the Court do is to give us a time frame and some dates, and in the process of back and forth between counsel for the parties, we can discuss whether or not we still believe oral argument is necessary. And assuming the consensus is that we want oral argument, then we'll get back to the Court with one of the dates.

Now, obviously if the Court doesn't want oral argument, that's a totally different --

THE COURT: No, I'm in favor of it. You know, I do it regularly in my bigger cases, but there is a downside.

MR. CANFIELD: Understood, Judge. You've made that clear, and, unfortunately, I can't speak for everybody because my marching orders were to present the proposal that I just presented.

THE COURT: All right. Anybody else want to say anything on the plaintiffs' side? Mr. Balser? Ms. Sumner?

MR. BALSER: Your Honor, on the subject of oral argument, I do think both sides believe that it would be helpful to the process to have the time to wade through the arguments, and we've got a 99-count complaint in the consumer case, lengthy motions and briefs on both sides. So I think it probably would be helpful to help distill the arguments and certainly to address any questions that the Court has or concerns or issues. I think it might actually streamline the process.

If the Court -- and one thing that had occurred to me and I've found helpful, sometimes before an oral argument the Court will let the parties know particular issues that are on the Court's mind to help hone and frame the arguments that the Court most wants to hear about.

So I could envision a scenario in which the briefing is done in November. There is a lot to wade through, as Mr. Canfield notes, but if we were looking at some argument

date in December at some point, if the Court's schedule would permit that, then if there were some interim period where the Court sometime in advance of the argument could let us know what it's most interested in hearing about, then we could try to make it as productive as possible. And it may actually assist in getting an order framed more quickly than the Court might otherwise have the time to do without the benefit of argument.

So I do think it would be helpful, and I think the parties are committed to working together to schedule something that makes sense for the Court. So it's certainly not our intention to delay an order by requesting the argument. We're just trying to be as helpful as we can to the Court in wading through what are some very knotty and difficult legal issues.

THE COURT: Well, Mr. Balser, I assume that you're going to want to have equal time.

MR. BALSER: We will want to have equal time.

THE COURT: Which, if my math is correct, would add up to five hours.

MR. BALSER: Your math is correct, your Honor.

THE COURT: All right. Well, I will tentatively try to find a day in December to do this, and God have mercy on us. All right, Mr. Canfield, Item No. 2.

MR. CANFIELD: I know this is one of your favorite

subjects, your Honor, but we appreciate the Court's willingness to hear us on these two related issues. The parties have tried to resolve both of them. We've been negotiating about the NDA issue since mid May. We've had no success. So as far as the plaintiffs are concerned, we're at an impasse on both issues, and we need direction from the Court in order to know how to proceed. Some background about how we got to where we are now may be useful for the Court to appreciate.

After the Court appointed leadership in the consumer and FI tracks, plaintiffs' counsel began discussing case management issues, including a schedule for discovery. Our preference as plaintiffs counsel would have been to move forward with discovery quickly before memories fade, employees move on, and evidence is lost. And generally in our experience the earlier that discovery begins the sooner cases get resolved. But we're well aware of the automatic stay that this Court has built into its local rules, and we're well aware that the Court's preference is to put off discovery until after a ruling on any motions to dismiss. We also knew Equifax was going to oppose any earlier discovery.

So we proposed a compromise approach to avoid the dead time while waiting for the Court's ruling on the motion to dismiss. We suggested that the parties deal with as much of the prediscovery stuff that needs to be dealt with before

effective -- discovery effectively can begin, and that includes reaching agreement on all the various case management orders, such as a confidentiality ESI protocol and the like; doing much of the meeting and conferring and negotiating about written discovery, such as negotiating search terms and custodians for electronic searches.

And then with this stuff out of the way when the formal discovery period opened after the Court's ruling on the motions, discovery could actually begin immediately, and Equifax would know the documents that we want. We knew what search terms and custodians were going to be used. The searches could be done. And all of that delay that's typically billed into discovery at the beginning of a big case would be avoided.

We were optimistic that this compromise approach would be agreeable to Equifax. The Court adopted it in *Home Depot*, and many of the same lawyers are involved in both cases. And, in fact, Equifax did agree with this approach, which was built into the joint preliminary plan and scheduling plan and the various CMOs that the parties have jointly proposed and the Court entered.

For example, the joint preliminary report lists the proposed discovery orders that the parties would negotiate and dates for them to be submitted. CMO No. 4, the discovery protocol that was entered in April, early April, directs the

parties to attempt to reach agreement on search methodologies. The parties were directed to exchange certain information about custodians and a general description of where their ESI is kept, and that CMO requires the producing party in discovery to propose a list of search terms. And the parties are to agree and to confer about them to see if they can reach an agreement. That's clearly set out in CMO No. 4.

This same process is built into the stipulation and order for the production of documents and ESI that was entered by the Court about six months ago. And in that order paragraph 30 provides, the parties have begun to meet and confer, as directed by the Court, relating to the process of searching for documents responsive to discovery, including specifically the identification of search terms and custodians to the extent that they're necessary in responding to specific discovery requests. The Court expects that the parties will continue to meet and confer on this issue to ensure that discoverable responsive non-privileged documents are identified and produced as efficiently as possible.

Now, the parties have done a great job dealing with all the proposed discovery orders. We got the ones negotiated that we anticipated and the Court directed us to do, and there really wasn't an awful lot of disagreement about that. But we've made virtually no progress and no effective process negotiating search terms and custodians or reached any

agreements regarding how documents are going to be produced.

There are two big problems. The schedule required that the plaintiffs serve their written requests for production, which we did at the end of June. Then the parties were to meet and confer about that document and the search terms and custodians by the end of July. There was one telephone meet-and-confer session before the end of July and nothing since.

At that meet-and-confer session the plaintiffs told Equifax that it would be very useful if Equifax would provide us with some documents so that we could meaningfully know which custodians' records had to be searched and what search terms would be useful in identifying the documents that bear upon the issues in the case. Equifax sat on that and didn't get back to us until last week and said they weren't willing to produce anything. They also told us that they weren't going to produce any search terms, a list of search terms, but they would consider a list of search terms that the plaintiffs propose.

That's a significant problem, also doesn't comply with the court order, but we're not asking for an order that compels Equifax to give us a list of search terms. I'm sure it was an oversight. Equifax is going to comply with a court order, and we haven't had a chance to remind them about it yet. But they can go ahead and give us a list of search

terms, but it doesn't really help us. We don't have the knowledge or the information to evaluate any list that Equifax may give to us, and we certainly don't have information or knowledge to produce our own list.

The Court should be able to understand how difficult it is for plaintiffs' counsel to figure out how to search Equifax's own records regarding an incident without any knowledge of how Equifax keeps its records, how people communicate, what terms they use in describing what takes place within the company. And there's nothing unusual about this case. Every -- virtually every case where you have a big corporation as a defendant it's hard for plaintiffs to try to figure out and evaluate the search terms and custodians. And it matters because if you screw up the list of search terms and custodians and you overlook some key elements of the case, you may, as a plaintiff, be unable to prove some of your allegations because you inadvertently did not get the information that you need. That's true in any case.

But this case is even more difficult for us to come up with search terms and custodians because according to media reports and a civil lawsuit that was filed in connection with the insider trading charges that were brought, Equifax used code words within the company to describe its activities following their disclosure of the breach but before the breach was publicly announced. And according to one of the

documents, there was a reference to a project Sparta. And if Equifax set up its communication so that it's own employees couldn't figure out what was going on, how is it possible for plaintiffs' lawyers to try to get the same information? We never would have thought that you need the search on the term Sparta, and so we basically lack fundamental information.

The problem is compounded because of the NDA issue. In many cases plaintiffs are able to go out and interview former employees, find out the basic facts relating to what's going on in a corporation, and use that information to negotiate with the defendants over search terms and custodians. We can't do that. We tried, but we ran up against the NDAs, which I'll talk about in a moment.

So where does all this leave us? We're under a court order to negotiate search terms and custodians so that the document production goes smoothly, but that's negotiations going nowhere. And it's not going to go anywhere until we have some basic information about what happened at Equifax.

So what plaintiffs tried to do in order to comply with the Court's order and move the litigation along, which is in our interest, is we came up with a list of very limited targeted discovery that we thought would help us in being able to do what the Court has directed us to do. So we put the list together of the four items that were in our letter, and we spent a lot of time figuring out what we were going to put

on the list because our intent was to try to come up with discovery methods that would impose little or no burden on Equifax while getting us the information we need to do what the Court has directed us to do.

So that list includes the documents that Equifax has already produced to government authorities. They should be electronically available. Seeing those documents is obviously going to let us get up to speed on what happened. I suspect that that's going to get us most of where we need to go to be able to meaningfully do what we're supposed to do, but there will probably still be some holes.

So that's why we wanted to have the ability to require some limited third parties who have information and who already had received document preservation subpoenas to go ahead and produce their documents. And we didn't give the Court a list of all of those third parties, but what we propose is that if the Court allows us to do this, we'll meet and confer with Equifax and I'm sure we'll figure out an agreement on what specifically it is that we want and how we'll go about doing that.

The third thing we've requested is one limited 30(b)(6) deposition into the basic kind of information that we need to fill in the holes that's not apparent from the documents, if we get those documents, or to get us the other information that we would require. We're not talking about a

lot of time. We're not talking about a lot of people, one basic 30(b)(6) deposition.

And then, lastly, because we've been frozen out on being able to effectively communicate with former employees, we request up to four depositions of former employees, which we won't need if the Court gives us relief from the NDA. Equifax has said no to all this. It's left us in a quandary, and that's why we decided to make the request that we did.

Now what has Equifax had to say about all this? What's their position? Based on their letter, the first thing they do is make what's essentially a waiver argument, and they point out that the scheduling agreement was negotiated by the parties and entered by the Court. And it says that discovery doesn't open until after the motion to dismiss rulings. But the scheduling order in paragraph 10 on page 20 expressly states -- and I'm quoting -- counsel for the parties may seek leave from the court to conduct limited early discovery prior to commencement of formal discovery.

So we're just doing exactly what the Court said we could do, and it's bill into the order. We couldn't get the information we needed. We couldn't get it voluntarily. So we're seeking very limited relief from the Court's discovery stay.

The next thing that Equifax says is they cite the *Chudasama* case from the Eleventh Circuit, seemingly for the

proposition that motions to dismiss should always be resolved before discovery begins, but that's not what that Court says or what that case says. It was a very unusual case and in which the Court essentially turned over its courtroom to the plaintiff's lawyer, and he ran roughshod over the whole process. And a default judgment was entered against the defendants for failing to respond to discovery, all before any ruling on a motion to dismiss had occurred.

And subsequent cases from a variety of courts in this circuit made clear that that case doesn't impose some sort of an ironclad rule. And the upshot is the Court clearly has the discretion to allow the limited relief that we're requesting, if the Court decides that's what should happen. There's no rule in the Eleventh Circuit that would prevent it, and there's case law that supports it. And it's been done in many other cases.

The third thing Equifax says is they cite several cases denying requests for documents produced in government investigations on the ground that a defendant only has to respond or shouldn't have to respond to a broad request like that, but instead the plaintiff has to identify the specific categories of documents that are sought. And then the defendant can go and look in those documents and produce them. There are cases that say that. That's not the universal rule or even necessarily the majority rule. Many cases hold the

other way.

Many of the cases cited by the defendants, in fact, suggest that there were particular circumstances in those cases that required the Court to rule the way it did. And if the Court is concerned about those cases in any -- the parties can brief them, but we don't think that it really matters because we have served specific discovery requests. We did it last June.

And while it's hard to believe that Equifax produced any documents to the government that aren't covered by one of the requests that we've made, if Equifax wants to reorganize those documents and produce some in response to our specific requests rather than just turning over what it's already produced, that's up to them. But to the extent there's a burden in that process, the burden is one that's being voluntarily assumed by Equifax. It's not one that we're seeking to impose on Equifax. But even that shouldn't be that burdensome because these documents are all, I'm sure, available in electronic form and indexed so that whatever culling needs to occur could happen fairly quickly.

Lastly, Equifax cites a transcript from the initial conference in the *Androgel* case in which this Court ruled that documents that had been produced to the FTC by the defendants didn't need to be provided to the plaintiffs prior to the ruling on the motions to dismiss. This Court is aware I made

that argument. The Court disagreed with me. The Court declined to allow us to get those documents for a variety of different reasons. But *Androgel's* were a different case, and it's hardly a very good case to support Equifax's position. In that case the parties didn't agree to engage in a meet-and-confer process before the rulings on the motion to dismiss. It wasn't ordered by the Court, and when we ended up turning to the question of search terms and custodians, then negotiations took six to nine months. And as the Court is well aware, it was a difficult and lengthy process.

There was a lot of flailing around, even after a lot of discovery had already occurred. And the discovery in *Androgel* seemed never ending. It just went on and on. And I'm not saying that the Court's denial of my request that we get the FTC documents is responsible for what happened in *Androgel*, but I do say that if we had started a meaningful meet-and-confer process way back when in the early stages of the case, that the case would have been handled by the parties much more efficiently. And we wouldn't have had to take so much of the Court's time in the process.

THE COURT: It was a painful experience for me.

MR. CANFIELD: It was painful for everybody. And what we're trying to do is avoid that in this case. The reality in a large case like this one is that the major factor determining the length of time needed for discovery is the

amount of time that the defendant needs to produce the relevant documents and data. That's just a reality. In most cases like this the plaintiffs don't have that much in the way of discovery so the burden is on the defendants. And so how efficiently and how long it takes them to produce what they've got is the -- is really the determining factor. And they can't produce documents until there's been an agreement on search terms and custodians.

Once an agreement is reached, it takes time for the defendants to run the searches and produce the documents that are requested. The plaintiffs need time to review those documents, and most of the key depositions aren't scheduled until the documents have been reviewed. That's a long process, and I obviously don't know when the Court will rule on the motions to dismiss. It sounds like next year is going to be tough. If it is similar to what happened in *Home Depot*, assuming the Court denies the motions to dismiss, we may not be starting discovery until sometime next fall, two years after the data breach occurred.

But what I do know is that if the parties can meaningfully negotiate search terms and custodians now and in the interim, we're likely to reduce the amount of time it's going to take this case by a lot. I don't know exactly how much, but it's going to make it a lot -- move a lot more quickly. And I know that without the kind of factual

information that we don't have and that we're seeking, we're not able to proceed in any meaningful way with that process.

So that's why we ask that the Court grant the limited relief that we've asked for, recognizing that it's not something that the Court frequently does, but in this case it's called for to avoid the kinds of problems we had in *Androgel*.

That's all I've got to say on the discovery relief issue. I can turn to the NDA issue now or the Court can hear from Mr. Balser on the discovery issue before I move on.

THE COURT: Let's do it now.

MR. CANFIELD: Okay.

THE COURT: Mr. Canfield is going to do the NDA issue now.

MR. CANFIELD: On the NDA issue, our investigators have tried to interview numerous former employees. A number of these former employees are willing to talk, but they mention that they had signed an NDA when they left Equifax. We terminated the interviews, and we didn't want to run afoul of either the NDAs or do anything that would suggest we had acted inappropriately. And after it had happened several times, we approached defense counsel to see if Equifax would agree on the terms of a proposed order that would deal with the situation.

So say that was in mid May. We don't have an

agreement. We're at an impasse. We don't think that there's any prospect that there will be an agreement without a major change in the parties' positions, and we don't think that's likely to happen. So we need the Court's direction.

I'll let Equifax speak for themselves obviously in more detail, but as I understand their position, Equifax doesn't contend that its NDAs preclude its former employees from talking to us. Their concern is to protect privileged information so that's not disclosed, and they want to maintain the confidentiality of that information so that it doesn't become public. We don't have a problem with either one of those things.

We agree that Equifax has a legitimate concern about protecting privileged and confidential information. That would be so even if the NDAs didn't exist. Our investigators are trained to identify themselves, state the purpose of the call, not ask for or allow the person being interviewed to share privileged information, and to treat the information they obtain as confidential. And we've never had any hesitancy about formalizing that training in an order.

The dispute between the parties and the reason we haven't been able to agree is Equifax has insisted upon other conditions that we contend don't have anything to do with protecting confidential or privileged information and Equifax knows won't be acceptable to us. Example, they want

plaintiffs' counsel to identify in advance each former employee we intend to interview and to give them the dates we intend to conduct the interviews on. They've requested that we agree to a requirement that we give Equifax in advance a list of all the questions we intend to ask their former employee, and they want us to agree in advance that we will not ask the former employees about any information that is known to the former employee that occurred after the end of July of 2017 when Equifax itself began to discover that it had been breached but long before it was public knowledge.

If we agree to these conditions, there's little doubt about what's going to happen. Equifax is going to contact each former employee we identified and conduct its own interview using the questions we've provided. The likely that the former employee won't want to talk with us likely will increase either to avoid the hassle, to curry favor with a former employee, or simply to avoid having Equifax know he or she cooperated with us.

Even if the employee does agree to talk to us, the chances that we're going to get the former employee's independent recollections as opposed to some sort of rehearsed version like you would get at a deposition, is going to go down. And the price for all these restrictions is that we have to share the price for the restrictions and for the ability to talk to the former employees, is we have to share

with Equifax our impressions about which former employees are important and which questions are important. And for us that price is not worth the potential benefit.

So what we have done is to propose an order that's set out in our letter that we believe protects the interest of all involved. It protects Equifax's interest in confidentiality and in protecting its privileged information. It protects the interest of former employees who may or may not want to talk to us, and it allows us to try to discover the information that we need to do what the Court has directed us to do.

So if the Court has concerns about all that, we can go through a briefing process if it's necessary. It will just cause more delay, but we're certainly willing to do it. We don't think it's necessary. If the Court does have concerns about the order that we've proposed, we believe that the more efficient and speedier approach that saves the resources of the parties and the Court so you don't have to make a decision in this area, would be to simply lift the discovery stay for the sole purpose of allowing the plaintiffs to depose former employees.

That way we get the information we want in the way we want it while Equifax will be able to object on the record to any questions that it believes are appropriate, and there will be a record if there's a disagreement so that the Court can

rule. That's the -- if the Court has any concern about our order, we would ask that you simply lift the stay with regard to former employees so we can get the information we need. That's all I have to say, Judge. Thank you for your time.

THE COURT: Mr. Balser.

MR. BALSER: Thank you, your Honor. I am going to respond to Mr. Canfield's arguments regarding the effort to lift the discovery stay, and Ms. Sumner is going to respond to the issue relating to the NDAs, if that is satisfactory to the Court.

THE COURT: That's fine.

MR. BALSER: Your Honor, Eleventh Circuit precedent Scheduling Order and Local Rule 26.2 prohibit pre-answer discovery. Plaintiffs acknowledge this. They acknowledge that Rule 26.2 prohibits pre-answer discovery. The timing limitation that's set forth in Local Rule 26.2(a) is also specifically provided for in the scheduling order that the parties negotiated and agreed to and that the Court entered. At page 17 of the joint preliminary report and discovery plan, the beginning of fact discovery is -- and I quote -- 30 days after the answer is filed in the consumer track or the financial institution track, whichever is later. That's what we agreed to do.

I want to talk a minute about the Eleventh Circuit cases that we cited in our letter brief. The *Chudasama* case

that Mr. Canfield referenced has some language that I think is instructive here and explains the rationale for preventing discovery before we know what the operative claims in the complaint would be, and that was a strange case, as Mr. Canfield noted. That was a case in which the district court sanctioned the defendant for failing to comply with various discovery requests.

The Eleventh Circuit reversed the trial court's decision and held, among other things, that discovery shouldn't have even begun in the case because the defendant's motion to dismiss was pending and because the nature of the permissible claims was unknown at the time the discovery was being propounded.

And one of the things the Eleventh Circuit said -- and I quote -- is allowing a case to proceed through the pretrial processes with an invalid claim that increases the cost of the case does nothing but waste the resources of litigants in the action before the Court, delay resolution of disputes between other litigants, squander scarce judicial resources, and damage the integrity and the public's perception of the federal judicial system. We cited the *Roberts v. FNB* case, which is the most recent Eleventh Circuit case affirming *Chudasama*. That was a case in which the district court stayed discovery pending a motion to dismiss, and the Eleventh Circuit affirmed that and noted that is

generally what should be done.

Plaintiffs' letter brief argues that there's good cause to depart from the local rule, but it ignores both the scheduling order and the Eleventh Circuit precedent. The Eleventh Circuit precedent, the local rule, and the scheduling order prohibiting pre-answer discovery exists to protect defendants like Equifax from engaging in substantive discovery before the parties know what, if any, claims will be litigated.

The consumer complaint here, as I mentioned before, contains 99 alleged causes of action, all with different elements that may require different discovery. We filed what we believe is a meritorious motion to dismiss each of those claims, and we filed a motion to dismiss each of the claims asserted in the financial institution complaint. The Court's ruling on those motions will shape the scope of any permissible discovery here.

To put it succinctly, the plaintiffs have not shown good cause to deviate from the local rule and from the agreed-upon schedule here. In their letter brief they cite three authorities for the Court to consider, and none of those authorities helps. They cite the *Merial v. Fidopharm* case, which is a case that Judge Jones had. We also cited that case, and that's a case in which the Court considered various factors to be considered when deviating from the local rule.

And chief among them was whether there was a preliminary injunction pending. That was a case in which Judge Jones did allow limited discovery because it was needed for a preliminary injunction hearing before an answer had been filed.

They also cite to Local Rule 26.2(b) which states only that the Court may in its discretion shorten or lengthen the time of discovery or, of course, 26.82 specifically says that discovery begins 30 days after the appearance of the first defendant by answer. And they cite *White v. Georgia*, which is a case that Judge Duffey had in which Judge Duffey acknowledged that he had the authority to stay discovery pending a motion to dismiss, and he ended up granting that stay.

The general rule didn't apply there because -- the general stay of discovery didn't apply because one defendant in that case had answered, but he exercised his discretion to stay discovery pending a motion to dismiss even though there had been one defendant who answered. Those are the three authorities they cite in their brief in support of their request to deviate from the local rule.

And as we point out, your Honor, in our letter brief, even if they could make a showing to deviate from the local rule, which they have failed to do, the plaintiffs' discovery requests here are improper. They seek the documents that

Equifax produced to government regulators without regard to whether the documents were relevant to particular claims in this case, and of course it's not yet known which of those claims, if any, will go forward. There are ample cases, legion cases -- a legion of cases that stand for the proposition that clone discovery, that is, discovery that asks for all documents produced in connection with an investigation or other litigation is improper because it does not tailor the request of the Rule 26 standard. Courts across the country have recognized that and refused to allow such requests, yet those are the exact requests that are made here.

When properly tailored, plaintiffs' requests for documents are nothing more than normal document requests, and we would be under the extreme burden of having to undertake a review in production of responsive documents just as we would in any other production, which is exactly what the parties agreed in the scheduling order would not happen until answers are filed.

So the contention that this is simple and we can just push a button and if we want to cull out, well, that's not a burden they're seeking to impose, kind of misses the step that their requests are overly broad and not narrowly tailored. And Courts across the country have said that's not a proper means of seeking discovery. So in order to do what they want us to do, we would have to undertake significant time, effort,

and expense, which may be all for naught depending on what the Court decides on our motion to dismiss.

The next point I think, your Honor, that I want to make -- and it does go to some of the points that Mr. Canfield was talking about with respect to *Androgel* -- there's no reason to allow premature discovery here now. It's not necessary to advance the case. Why do I say that? For many of the reasons that Mr. Canfield articulated and what the parties have agreed to do in the scheduling orders and other case management orders that the Court has entered.

The Court has already ordered a host of prediscovery tasks aimed at ensuring that discovery begins promptly and runs efficiently, including negotiating proposed protective order, which has been done, negotiating an ESI protocol. And I will say, your Honor, today is the first time we have heard anything about an issue of an impasse or some problem with the ongoing discussions with respect to search terms. And I would respectfully submit that the conversations have been not between Mr. Canfield and me but between Mr. Guglielmo and his team and Ronnie Solomon, who's our ESI discovery partner at King & Spalding.

There have been discussions. The discussions, as I understand it, did occur in July. We heard -- they said we haven't done anything. We heard nothing from them until just before this status conference, so last week they picked this

issue back up. And I would respectfully submit this is a Trojan horse. They are manufacturing an issue that doesn't -- it's not a real issue, in order to get discovery that they want. I mean, what they're saying is we can't figure out the search terms, so we need discovery to figure out what the search terms should be. It's just backwards.

We are committed to continuing the dialogue that's required under the case management orders that have been entered, to discuss and negotiate search terms. But, of course, the time has not come to produce documents. There is no need today for search terms to be agreed upon. But we have never refused to produce search terms. We have never refused to have a dialogue with plaintiffs' counsel about search terms. This is not a real issue and yet they want -- that is the justification that they are using to deviate from our agreement on when discovery would occur and what the local rule requires with respect to the stay of discovery.

So there has been meeting and conferring going on with respect to document custodians, and, as Mr. Canfield said, we've agreed on custodians and the ESI -- as I said, ESI search term discussions. We're prepared to continue the dialogue.

So we believe that as that process plays out, unlike the situation that Mr. Canfield described in *Androgel* -- and thankfully it's a case that I don't really know anything

about. Sounds like you and Mr. Canfield know quite a bit about it and have been living it. But this case is very different. I think the -- apparently there were lessons learned from *Androgel*, which is why the Court has entered orders in this case requiring the parties to clear a lot of the discovery underbrush that would slow things down in the event that the case is permitted to proceed after the motions to dismiss are ruled on. And we have --

THE COURT: That's exactly why I did what I did, Mr. Balser.

MR. BALSER: And I understand that, and we have made a lot of progress. We've done a lot of things that in a typical case where a motion to dismiss is filed you would never do. I mean, we have a protective order. We have agreed on the custodians. We have been negotiating an ESI protocol. We have four or five different case management orders that have been entered. We have been negotiating and have agreed on most things. I mean, we have worked well together, and, frankly, we just do not think there's any kind of impasse or justification based on sporadic discussions on ESI search terms that would justify such a Draconian and expensive time consuming result as the lifting of the stay of discovery.

And I would say, your Honor, I think I would be remiss if I didn't say that, you know, we've got very sophisticated plaintiffs' counsel who chose to file their

lawsuits here, and lawsuits were filed around this data breach in every state in the United States. And we all went before the JPML, and lead plaintiffs' counsel here argued to get these cases consolidated in the Northern District of Georgia knowing what Rule 26(a)(2) says.

We also supported consolidation of these cases in the Northern District of Georgia for many reasons, but one of those reasons was the discovery stay that 26(a)(2) provides. There are many other jurisdictions for which other counsel lobbied and argued for before the JPML, which did not have stays of discovery. And if this had been a really critical and important issue, my colleagues could have argued for and sought consolidation in a district where pre-answer discovery was permitted, but they didn't do that.

And those are the settled expectations of the parties, based on the local rules, based on governing Eleventh Circuit law, and based on the scheduling order that we all agreed to. And there's been no showing that comes close, respectfully, to meeting the standard for disrupting the settled expectations the parties have that are embodied in the local rule that governs all proceedings in this action.

The last thing I would say, your Honor, is that with respect to *Androgel*, you know, that is a case apparently where there was not any activity called for before -- discovery related activity called for required prior to an answer being

filed or a ruling on a motion to dismiss.

And to the extent that there was a suggestion in the plaintiffs' letter brief that the timing of the motions to dismiss and the ruling on the motions to dismiss is what caused a delay there -- but we went and looked at the docket on the timing there. The motions to dismiss in *Androgel* were fully briefed by December 21st, 2009, and they were decided on February 22nd, 2010. So they were decided in two months and just -- and within four and a half months after the MDL was established. Whatever discovery delays existed and you folks have been living through were not caused by delaying the --

THE COURT: The motions to dismiss weren't the problem. It was a whole universe of other problems that arose after the Supreme Court said we had to start all over five years into the case. I certainly know the difference between the *Androgel* issues and what we're talking about today.

MR. BALSER: So it's just a different kettle of fish than what we've gotten here, especially given the productive work that has been done collaboratively between the parties pursuant to the Court's orders, including the scheduling order that we all agreed to.

So in sum, your Honor, we think the Court should deny this request to permit plaintiffs to engage in discovery, and I would say if the Court is in any way inclined to consider that request, we would request that the Court require them to

file a motion. There is much more we can and would say in opposition of this and would like to have an opportunity to brief it if the Court is not prepared to just reject the request on the letter briefs.

THE COURT: All right, Mr. Balser.

MR. BALSER: Thank you.

THE COURT: Ms. Sumner.

MS. SUMNER: Thank you, your Honor. Phyllis Sumner on behalf of Equifax. I think I can say good afternoon now, and I will address the issue with respect to the interview, the proposed interviews of former employees.

Your Honor, respectfully, I think Mr. Canfield is oversimplifying the issue that we are dealing with, and it doesn't truly appreciate what Equifax has gone through with respect to this security incident. As I'm sure you would appreciate, there has been significant internal investigations and lawyer involvement, in fact, quite a few lawyers involved in the investigation in the defense of Equifax since the security incident occurred.

And what Mr. Canfield and his colleagues are suggesting is that they have the ability to go in and speak with former employees and understand when those issues relating to attorney-client privilege may arise based on questions that they've prepared without having any understanding of what Equifax actually went through post

incident and including not only the investigation, but all of the communications that lawyers, including myself and many others, have had with those employees.

As a result of the incident, in fact, there are a number of former employees that were employed by the company prior to the security incident and are no longer with the company. There are employees who were involved during the security incident response and are no longer employed. But they all were involved in attorney-client communications and, in fact, preparing and doing work at the direction of lawyers.

So it's a very significant issue in terms of the post breach and what was privileged and what was not privileged, and this is going to be a sticky privilege, issue if we continue on in this litigation, that we will have to deal with. But it's not something that, based on the very simple outline that has been proposed, that we can expect plaintiffs' counsel to go in and be able to sort through those issues or, frankly, to expect former employees to understand those issues and respond to questions post incident.

In addition, your Honor, many of these employees -- and I'm making assumptions because we have not had any response to our request to have those individuals identified so that we could have more substantive conversations about the concerns that the company may have, but because we also are aware of a number of investigations and advice that attorneys

were involved in pre-incident and, also, the fact that the company has been defending litigation on a number of fronts for several years. And, in fact, our firm has been involved in talking with a number of employees, many of whom are no longer employed with the company who would have been involved in receiving advice from us having those privileged communications and would have worked at our direction relating to other matters.

We don't know, based on the communications that we've received from plaintiffs' counsel, whether the topics or the questions that they've proposed would touch on that because they have not been willing to provide us with any topics or questions that they would cover with these former employees.

In addition, your Honor, there are a number of former employees who did sign nondisclosure agreements, and it is true that we have said that alone would not preclude the interview of those former employees. So we do have some agreement. Although Mr. Canfield said that we weren't able to reach agreement, we have reached some agreements with respect to understanding that we would be willing to allow those interviews to proceed forward. We just have to set appropriate parameters to ensure that we protect important sensitive and confidential information.

Some of the NDAs go beyond agreements with Equifax. They involve agreements with third parties, and so we also

have to be careful about Equifax's obligations to third parties and what Equifax has agreed not to disclose about information. And those employees may have been involved in those nondisclosure agreements. There are a number of different nondisclosure agreements, and so it would depend on which employees they identified as to even which nondisclosure agreements would come into play. This is a very complex issue that continues to get more complex as we dig into the facts without more information about what the plaintiffs envision.

Another issue which is of significant concern to the company is the confidentiality around the company's security. Obviously, your Honor, the company is very, very concerned about sharing information that would allow others to understand confidential and very sensitive information about the security of the company. That would include some of the information that they would seek to obtain pre-breach as well as post breach. And I'm quite confident that the plaintiffs' counsel would not want to introduce a vulnerability into Equifax's security because they are asking individuals to share information that is highly confidential and sensitive information about security.

Again, we don't know what they intend to request information about because they have not shared those topics or the individuals. But these are all concerns, real concerns, that the company has about just opening the door to plaintiffs

in a very simplistic one, two, three, four, this is all we need to tell the former employees, and now they should be allowed to speak.

We have been engaged in significant conversations with the plaintiffs' counsel about a process to protect some of these significant concerns, and we do believe there was some progress made all the way to the point where Equifax was even willing to participate in a letter to help outline some of these issues which may be much more productive for plaintiffs' counsel than for them to tell former employees from their perspective that the NDA doesn't apply.

It seems liked it would actually be helpful to them to be in a process where Equifax is involved in the communications to those former employees to help them understand that they can speak to plaintiffs' counsel with some parameters and that the NDA would not preclude them from doing that. But the way that they propose it now has now abandoned the direction that we had been discussing, and they simply would be telling the former employee that they can speak and the NDA would not preclude them from doing so.

So we had proposed a letter as well as had some conversations about a script to address some of these significant concerns. We think we were having some productive dialogue. That dialogue was most recently information that we had provided back on September 19th that was rejected, and so

we're here talking with you now.

I think there are a couple of things, your Honor, that we would request you to think about. One -- and this is based on prior precedent in this court, in fact, a case that Judge Duffey decided. It is In Re: Spectrum Brands, and that was a matter in which Judge Duffey considered the plaintiffs' request where they sought an order limiting the scope of a confidentiality agreement or in the alternative, similar to here, a lifting of the discovery stay to allow the plaintiffs' counsel to proceed. And in that matter Judge Duffey believed that it was -- would be an impermissible advisory decision for the Court to even consider that without having the nondisclosure agreements before the Court and have a deeper understanding of the issues.

So, your Honor, I think where we are here today, from Equifax's position, we are asking you if you believe that this is an issue that should be addressed and that you would be inclined to consider an order that it needs to be fully briefed, that this is something that the plaintiffs should bring a motion, that we should have an opportunity to address some of these very significant issues for Equifax.

And, frankly, we believe that it would be fruitful to continue our conversations to see if we can get to a point and an agreement where we felt like we were actually making progress and setting up a process to allow them to continue

forward. But if they don't believe that continued discussions would be fruitful at this point, we believe it's very important to move forward with a briefing and motion practice. I'll pause there, your Honor, and ask if you'd like me to address anything else at this point.

THE COURT: Thank you, Ms. Sumner.

MS. SUMNER: Thank you.

THE COURT: Well, I really wanted to resolve this disagreement today, but I don't think I can. This has been -- the letters, the discussion today, have been helpful to me, and I can say there's not going to be any blanket lifting of the stay on discovery. There may be a limited lifting of the stay if I'm persuaded by motion and full briefing that there's good cause to alter the scheduling order.

So, Mr. Canfield, you may be able to obtain some of the relief you're seeking from me, but you'll have to file a formal motion and brief the issues. And I think the discussion today should be helpful to you in terms of particular points you may want to address in your briefing, and a blanket lifting of the stay is off the table. Limited lifting is still on the table, and if y'all can negotiate and make further progress than you apparently have in terms of the background preparations for more efficient and more productive discovery, if the motions to dismiss are denied, that would be welcome by me.

So you file your motion. I hope that the briefing on that will be accomplished without any lengthy request for extensions of time by either side so I can address the issue as quickly as possible and we'll move on.

MR. CANFIELD: Thank you, Judge. We'll do that. I do have one request. In getting into the case law, some cases have focused on the specific terms of the NDAs at issue in deciding how to deal with those. We haven't seen any of the NDAs that Equifax has with its former employees, and we'd request that Equifax give us some exemplars of what those NDAs say so that we can have a full record to brief this on for the Court.

MS. SUMNER: Your Honor, it would be very helpful if they could identify some individuals so that we could actually provide them an example of an NDA that would apply here. As I mentioned, the company has different confidentiality agreements, some of which involve third parties. So rather than just blindly turning over NDAs that may be entirely irrelevant, it would be helpful for them to at least provide some sample listing of former employees so that we could base their request on that.

MR. CANFIELD: That's been the problem, Judge. We don't want to have to identify the former employees that we're speaking to because they don't want Equifax to know they're speaking to us. So I didn't ask for all their NDAs. I'm

asking just for exemplars. They know who was involved in the breach. They know who's left since the breach. Just give us some examples of the kind of NDAs that are at issue, and if there's a third party exemplar, they can give us one of those. If there's just a normal NDA they use, we'd like an example of that so that we know what we're talking about.

THE COURT: Ms. Sumner, give the plaintiffs four of the agreements of employees that you think the plaintiffs are most likely to want to talk to.

MS. SUMNER: Yes, your Honor.

THE COURT: Anything else on this subject?

MR. CANFIELD: Not from the plaintiffs, your Honor.

THE COURT: All right. Next -- well, I'm sorry, but we're going to have to take a break, unless you think your part of the agenda is going to be finished in the next five minutes, Mr. Canfield.

MR. CANFIELD: Mr. Siegel is handling the outstanding motions part of our agenda, Judge. I wouldn't anticipate that it would take a lot of time. But I'm not arguing it, so I would defer to Mr. Siegel.

MR. SIEGEL: And I in turn would defer to the City of Chicago that's here to argue its first motion. The remainder on the list should be very brief, your Honor.

THE COURT: All right. Well, we're going to have to take a break. Let's take a ten-minute break.

COURTROOM DEPUTY: All rise. Court is in recess for ten minutes.

(Brief recess.)

COURTROOM DEPUTY: All rise. This Court is again in session.

THE COURT: Thank you. Be seated. All right, Mr. Siegel.

MR. SIEGEL: Your Honor, Norm Siegel for the consumer plaintiffs. I think we've identified in our agenda motions filed in this court that are at various stages. The only one that's fully briefed for the Court is the motion by the City of Chicago to establish a separate track. Counsel for the City of Chicago is here. If it pleases the Court, I propose that he start us off on this motion. Thank you, your Honor.

MR. KANE: Thank you, your Honor. Steve Kane for the City of Chicago. Chicago is asking for either a separate track or a separate complaint within an existing track because we'd like some control over government enforcement claims that nobody else in this MDL is making.

Now, Chicago is a city of nearly 3 million people, so just by virtue of our size and public status I think we have a far greater interest in controlling our claims than any particular individual plaintiff would. And that's particularly true because our claims differ from the claims that are asserted on the consumer track, which is where

Equifax and plaintiffs want to put us.

First, we base all of our claims on a Chicago ordinance. It's not even cited in the consumer complaint. And the ordinance differs from the statutes the plaintiffs invoke because it doesn't require us to prove elements like reliance, causation, injury. We just have to prove an unlawful or unfair practice under an Illinois statute. And so most of the arguments that Equifax has made in its motion to dismiss just don't even apply to us.

Second, we want no part of plaintiffs' class allegations. Plaintiffs are currently just 96 people. So they need a class. By contrast, the data breach probably affected over a million or so Chicagoans, and our ordinance requires a minimum fine of $2,000 per violation. And each day that the violation continues that's another fine. So you can see we don't need a class; we don't want a class. And we'd much prefer to have control over our own claims rather than get caught up in plaintiffs litigating class issues.

Third --

THE COURT: So, now, I assume that you've already had a case in which you had filed a complaint that was transferred here by the MDL panel.

MR. KANE: That is correct, your Honor.

THE COURT: So you've got a complaint.

MR. KANE: We do have a complaint. What we're

thinking of, if they're not a separate track but rather a separate complaint, that it would be like the small business complaint so that it would be within a track, but we would get to litigate it concurrently with the other cases. And I think that's because we've got substantial claims here on behalf of a very large city. We've got different issues. We don't want part of this class that I think is going to slow us down.

THE COURT: So I don't want to get into a full blown oral argument on a motion that's already been fully briefed. But does anybody oppose you having your own complaint?

MR. KANE: Well, I don't think they oppose us having our own complaint. My understanding -- well, actually, I shouldn't say that. Equifax, I believe, in their opposition did say they don't want a separate complaint. My understanding -- of course I'll let them speak for themselves -- is that the consumer plaintiffs are fine with us having a separate complaint, but they want us to wait for litigation of their cases until we get to litigate our own.

We don't want to be sitting around waiting for class issues that we don't care about to be litigated while we sit on our hands basically. That's why we want to get going on the same track currently, so we can get to a resolution as soon as we can.

Now, I should say Equifax seems to think that the consumer complaint already encompasses our claims. That is

not correct, your Honor. The consumer complaint says it's brought by individual plaintiffs on behalf of similarly situated persons and supersedes complaints filed by natural persons. We're not a natural person, so the consumer complaint is not asserting claims for us. And, as I said, the consumer complaint doesn't even mention the ordinance that we base all our claims on, and it doesn't seek the civil fines, that there's monetary relief that we are seeking.

I think plaintiffs' main point is, well, we all seek the same discovery, but this is not about discovery. I do think the consumer plaintiffs will seek the same discovery we want, and so from that point I get why we're here in an MDL. But whether this should be a separate complaint is a different question. Given the scope of our claims alleging violations against, I think, over a million Chicagoans, I think we'd like more control than the usual plaintiff gets, and I also think it's important to keep our case distinct from the consumer cases given all the individual -- all the differences, legal differences, there are among the claims.

So I think those are our main points, your Honor. If you have any questions, I'm happy to answer them.

THE COURT: Thank you, Mr. Kane.

MR. KANE: Thank you very much.

THE COURT: Mr. Balser, do you want to say anything about this?

MR. BALSER: Mr. Haskins is going to respond on our behalf, your Honor.

THE COURT: All right, Mr. Haskins. Again, I'm not expecting full blown oral argument. I'm just trying to figure out what I need to be doing in the next few weeks.

MR. HASKINS: Understood, your Honor, and I'll try to keep this very brief, as we have filed a response to the City of Chicago's motion here to establish a separate track. And I will say just succinctly, your Honor, that we don't need a separate track. Let's start with the claims that the City of Chicago is trying to pursue, which as counsel conceded, they are pursuing on behalf of residents. Of course those residents are also consumers, and they are Illinois consumers on behalf of who Mr. Siegel and others have pursued, essentially identical claims.

Now, the City's claims are based on a City of Chicago ordinance, but that ordinance is based upon the violations of Illinois law. And, specifically, in this case they allege the violation of two Illinois statutes, the Illinois Personal Information Protection Act and the Illinois Consumer Fraud Act. In other words, they have to prove violations of those acts to prove a violation of the ordinance, and that's what they've alleged.

Well, those acts may sound familiar to your Honor because that's precisely the same acts that the consumer

plaintiffs in the consolidated complaint, that they filed earlier this year in Counts 32 and 33, that they allege violations on behalf of Illinois citizens.

So, in other words, the consumer plaintiffs in this case, your Honor, have already alleged violations of the exact same statutes on which the City of Chicago's claims are based on behalf of the exact same folks. In other words, City of Chicago residents are also residents of Illinois.

So your Honor is going to have to determine, in ruling on the motion to dismiss that Equifax has filed in this case, as to whether or not those are viable claims and whether or not they can establish violations of the Illinois Consumer Fraud Act and of that Personal Information Protection Act. But we don't need at this stage a new plaintiff interjecting a new complaint on behalf of the exact same citizens pursuing the exact same claims under the exact same laws. That would simply slow us down.

And, finally, your Honor, to the extent that there is a complaint and that we don't need a separate track, nothing has happened to that complaint. It's essentially been stayed, as the Court knows, pursuant to one of the early case management orders that your Honor entered into. It's no different than many of the other cases that were transferred as part of the MDL and then now have been stayed while the Court prosecutes the MDL in the manner in which the CMOs have

already set forth.

And the arguments that the City has made here that claim that there's some legal distinctions with respect to their individual claims on behalf of the City, that's exactly the argument that they made to the JPML, and the JPML rejected it in overruling their opposition to transfer, because as I'm sure the Court is familiar with, under Section 1407 the whole purpose of transferring cases that arise from the same set of facts and circumstances is to promote the just and efficient resolution of those cases.

I would submit to you, your Honor, allowing control by an individual plaintiff -- because that's all the City is because the rest of their claims on behalf of these Chicago residents are all subsumed by the consumer class action complaint. Allowing an individual plaintiff to have control over discovery and other aspects of the case is exactly the opposite of what consolidation and transfer under Section 1407 is designed to achieve. In fact, it would be not only inefficient but unjust to allow them to inject themselves into the case at this stage. Thank you, your Honor.

THE COURT: Mr. Siegel, what do you say?

MR. SIEGEL: Very briefly, your Honor. I think you put your finger on it, that there is a complaint in this MDL that was sent pursuant to 1407. That complaint is there. What we were trying to discern is whether the City's claims

are on behalf only of the citizens, in other words, are they just making claims on behalf of those citizens which are, in fact, covered by our complaint or are they bringing claims exclusively on behalf of the City of Chicago? Is the City seeking to recover?

To the extent they are, that complaint is there. The City has conceded discovery is the same, so we will be pursuing that discovery. We've indicated directly and in our papers that we would certainly hear from the City if they had specific discovery they wanted. But in terms of the specific request before the Court for a separate track, it's just simply not necessary for those reasons.

There's another major practical thing coming down the pike here. We have a pending motion from the Block plaintiffs claiming they need a separate track because they've sued individuals. That's not fully briefed yet, your Honor, so it's not before the Court. But that's coming. We know Puerto Rico, the commonwealth of Puerto Rico, filed a similar motion to the JPML seeking to have their case outside of the MDL for the same reasons the City of Chicago sought to have their case outside of the MDL. I suspect the JPML tomorrow will send that case here. Presumably they will want a separate track. None of that is necessary given how we structured this.

Those cases can be litigated to the extent there are things to litigate after our tracks have completed or moved

down the road at least, but at this point the specific relief sought by the City should be denied.

THE COURT: All right. Well, I'll look at the papers, of course, and try to get out an order on this particular motion as quickly as I can.

MR. SIEGEL: Thank you, your Honor.

THE COURT: Do you need to say anything else about the Block case motion, Mr. Siegel?

MR. SIEGEL: I think the only thing we need in Block is a, pursuant to CMO 5, is a schedule for us to respond to the motion for a separate track. Do you want to speak to that, Stewart?

MR. HASKINS: Yes, your Honor. We would just ask for 45 days for the opportunity to respond to that. The reason why we need a little bit additional time with respect to that motion is that Mr. Block has named some individual defendants in that case, and those individual defendants will need an opportunity to retain counsel and determine if they want to file their own responses to Mr. Block's motion for a separate track.

MR. SIEGEL: No objection to 45 days.

THE COURT: 45 days is fine.

MR. HASKINS: Thank you, your Honor.

MR. SIEGEL: Thank you, your Honor. And I think the others, the motions that we've identified on the agenda, are

going through the briefing process, and no further action is needed today from the Court. We're just flagging them for ourselves and for the Court's benefit. Thank you, your Honor.

THE COURT: All right, Mr. Siegel. Mr. Canfield, are we down to the date of the next status conference?

MR. CANFIELD: Almost. There are a couple of housekeeping issues that we would like to raise. The first is an item of information about which the Court is probably already aware, but, if not, Judge Westmoreland has entered an order staying the state court cases. So they will not be moving forward while the MDL is in process.

THE COURT: I was not aware of that.

MR. CANFIELD: Well, that's -- I'm glad we raised it. The second issue relates to an issue that occurred yesterday with regard to Mr. Worley sending out notice of a conference call that's available to counsel if we want to participate by phone rather than attend the hearing. And if need be, Mr. Worley can address this in more detail, but my understanding is he has not sent the conference call information to all the lawyers who have entered an appearance in the case. We're not even sending the conference call information to all of the lawyers who have been appointed to leadership.

We've done that because consistent with the Court's order we didn't want to encourage people to listen in, when it

wasn't necessary that they do so, and then bill for that. But we wanted to comply with the direction of the Court, and so we have a question. And the question is, do we need to more widely circulate the conference call information than we have been doing or should we limit it to those people who have a particular interest in participating in a hearing?

THE COURT: Well, it should be limited to plaintiffs' leadership counsel and others that the leadership thinks may need to participate. It was never intended to be everybody that's involved in this case. That's the whole point of having leadership structure, is so everybody doesn't have to do everything and bill for it and expect to be paid for it.

MR. CANFIELD: Thank you, Judge. That's the answer that we were actually looking for, and that's what we will continue to do.

That brings us to the date of the next status conference and consistent with the way that we usually handle these, the parties can work with Ms. Sewell to come up with a date that meets with the Court's approval at an appropriate time. I think that it probably makes sense to have another conference within the next 30 to 45 days, unless the Court is going to schedule oral argument soon enough that it's not necessary, but I believe the best thing to do would be to set a date for oral argument to deal with the kinds of issues that have been coming up at the ordinary course separate and apart

from the oral argument on the motions to dismiss.

THE COURT: Well, we're going to have oral argument, and it's going to be in December if a date can be found that will suit all of y'all. I don't have a trial calendar published for December, so finding a day on my calendar should be fairly easy. So we're going to do that. Do you think we need a status conference in addition to that?

MR. CANFIELD: I think it's helpful to move the case along and because it always -- the existence of that date tends to make people more reasonable and responsive to each other.

THE COURT: Fine. We'll do it.

MR. CANFIELD: And so if the Court can give us something in mid November. And if it's not necessary, we'll cancel it.

THE COURT: Fine. Y'all get together with Ms. Sewell after I leave the bench and see if you can find a date in mid November for the next status conference.

MR. CANFIELD: Thank you, Judge. That completes the status conference agenda.

THE COURT: Okay. Next is the In Re: Equifax derivative litigation.

MR. CANFIELD: May we be excused in the consumer track?

THE COURT: Yes.

MR. CANFIELD: And the financial institution track?

THE COURT: Yes.

MR. CANFIELD: Thank you, your Honor.

MR. SIEGEL: Thank you, your Honor.

(Whereupon, some consumer track and financial institution track counsel exited the courtroom.)

THE COURT: Mr. Weiss, are you still on the phone?

MR. WEISS: Yes, I am, your Honor.

THE COURT: All right. I'll hear from you first.

MR. WEISS: Thank you, your Honor. I appreciate it. As you know, we represent the lead derivative plaintiffs, Nancy and John Weyl. And based upon the previous arguments, your Honor has a lot to digest, and I'm not going to add to the indigestion. I can tell you that our agenda and the report are really more straightforward, I think, without any disputes.

As the Court presumably is aware, we filed the consolidated derivative complaint on July 12th of this year, and pursuant to a stipulation of the parties, the Court entered an order that the defendants are not required to move or answer until, I guess, until further order of the Court.

So what we've done in the interim, since the last status conference, is we've had a continuing dialogue with counsel for the Demand Review Committee to arrange a meeting, and we have, in fact, had a productive telephonic meeting with

the committee on August 30th, 2018, in which I made a presentation to the committee including input from our expert, which I'll get to in a moment, your Honor. And we've agreed to have follow-up meetings and conversations which really will be influenced by the decisions on the motions to dismiss the securities and consumer cases.

As to the expert, your Honor, we've informed the defendant -- and we're not trying to keep anything under our sleeve here -- that we've retained as our experts the Chertoff Group, which is a global advisory firm focused on security and risk management. The company was founded in 2009 by Michael Chertoff, the former Secretary of the Department of Homeland Security, and Secretary Chertoff still heads the firm and recently published a book entitled "Exploding Data: Reclaiming our Cyber Security in the Digital Age".

So we're going to be working with him, and we're going to be working with Robert Anderson, who's a principal at the Chertoff Group. Mr. Anderson retired from the FBI after over 20 years of service. The last position which he held was executive assistant director of the Criminal Cyber Response and Services Branch of the FBI where he was responsible for all criminal and cyber investigations worldwide, as well as international operations, critical incidents response, and victim assistance.

Some of the other principals at the Chertoff Group

whose expertise is available to us are General Michael Hayden, the former Director of the CIA and NSA; Jayson Ahern, former head of U.S. Customs and Border Protection; Jay Cohen, former Under Secretary for Science and Technology at the Department of Homeland Security and former Chief of Naval Research.

And I go through this, your Honor, because I think it was helpful to us in the conversation that we had with the Demand Review Committee, and we're going to be able to tap into what is really a vast amount of talent and knowledge as we continue on with this case, particularly together with our expert when we have the opportunity hopefully in the future to meet with the companies' in-house representatives, such as the CISO and outside experts and others.

So, as I said, I think much of what we're doing is probably going to be very influenced by the decisions on the motions to dismiss in the consumer and securities cases, but our points are very different obviously. And hopefully the cooperative engagement with counsel for the Demand Review Committee and with counsel of the company will continue. That's really all I have to say, your Honor, unless you have any questions.

THE COURT: Thank you, Mr. Weiss.

MR. WEISS: Thank you.

THE COURT: Mr. Sherman, are you here on the derivative case?

MR. SHERMAN: Yes, sir.

THE COURT: Anything you want to say on behalf of Equifax?

MR. SHERMAN: I'll actually leave it to -- for the Demand Review Committee, to my colleague, and actually Equifax is represented separately by King & Spalding.

MR. POPE: Mr. Pope on behalf of Equifax, your Honor.

THE COURT: We had you in the wrong case, Mr. Pope.

MR. POPE: Well, I'm in both cases, your Honor, securities litigation and derivative litigation, but I represent the company and certain individuals in derivative. We have nothing to add to what Mr. Weiss said on this agenda, and I'll turn it over to who represents the Demand Review Committee, your Honor.

MS. ELLIOTT: April Elliott on behalf of Ms. Stock and the Committee. We don't have anything to add either.

THE COURT: All right. Thank you. So that's it for the derivative case, Mr. Pope?

MR. POPE: Yes, from our perspective, your Honor.

THE COURT: All right. Then we'll move on to the securities litigation agenda.

UNIDENTIFIED COUNSEL: Your Honor, is it okay if we're excused, derivative counsel?

THE COURT: Yes.

UNIDENTIFIED COUNSEL: Thank you, your Honor.

(Whereupon, derivative counsel exited the courtroom.)

MR. HARROD: Sorry, your Honor. I know you're trying to keep this moving. James Harrod for lead plaintiff in the securities case. We have two agenda items. I think we can keep it short. The first one is just a general status that the motion to dismiss is now fully briefed. The defendants filed their reply brief in late August. And I will -- to be totally candid with your Honor, the defendants had previously raised with us the idea of oral argument, and I was prepared to take no position and to defer to the Court in the interest of trying to figure out whether or not you thought it would be helpful for us to present oral argument to you on the motion to dismiss.

After hearing what you said earlier today with respect to the MDL, my assumption is that you will also want oral argument in the securities case. And if that's true --

THE COURT: Somebody go shut that door back there for me, please.

MR. HARROD: And the only thing that I would offer -- and I haven't talked to my colleagues who represent the defendants -- is that I don't think we need to wait, and I think it would probably be better to have an oral argument for the securities cases sooner. I would propose some time, I guess, in October. The motion has been, you know, fully briefed now, so I think that would be appropriate if it's

consistent with your Honor's view that you expressed with regard to the MDL and subject to counsel for the defendants, you know, agreement and availability. So we can work that out and propose some dates to you if that's --

THE COURT: Well, Mr. Harrod, unfortunately October is another train wreck, but anyway we'll -- I'll see.

MR. HARROD: Or, you know, November. But I guess the larger point was it probably, at least from my perspective, and obviously it's up to you, it doesn't seem that -- at least in terms of the legal issues, they are pretty distinct from the legal issues in the MDL cases. And that sounds like it will be a very long day anyway, so it seems it would be beneficial to not have the arguments on the same day.

THE COURT: Not going to do it on the same day.

MR. HARROD: All right. The only other issue I have on the agenda is with respect to your order of June 18th which partially modified the PSRA discovery stay. And we have made -- I'm happy to report we have made some progress, and your Honor has entered, I believe, three orders at this time, a confidentiality stipulation, a proposed order for a discovery schedule, and an ESI protocol.

One of the things that was provided for in your order and this is -- that order is Docket Entry 64 in the securities case, and on page 24 you directed the parties to meet and confer regarding the custodians whose ESI will be searched and

what search terms will be used to search for ESI in response to any initial requests for the production of documents and report to the Court within 75 days of this order on any disagreements or issues with respect to that process.

So on August 8th we served our first request for production of documents on the defendants with the hope that this would begin the process of a discussion regarding custodians and search terms. Contemporaneous with when we served those requests, we asked defendants to make proposals to us by September 17th. We thought that would give them enough time to put something together. September 17th came, and we didn't hear from them. We followed up with them on the 18th and asked them if they would be providing some proposals.

In response they suggested we have a call, which we had on Monday of this week, and prior to that I'd sent them an email and said can you let us know if you're going to make a proposal, can you let us know if you've exchanged information regarding custodians and search terms with the MDL plaintiffs and whether or not you'll provide that with us. During the call -- and I'll let Mr. Pope express the company's position. But basically what they said was we'll give you what we've given the MDL plaintiffs regarding custodians. We have collected documents regarding the data breach that is in a comprehensive manner, and we expect that that will be the starting point for any production that is made in the

securities case.

But when I asked them if they would give us the search terms and the custodians related to that collection, I think that their position is that they will not. And so our view is that we can't identify disagreements to the Court about custodians, and we have made some progress. They did give me the information from the MDL that they shared with the plaintiffs this morning, but I don't think that they're going to engage with us or provide us with the search terms that they used to collect the documents that they are going to rely upon in producing documents in the securities case.

So I think we need that because I can't identify search terms or disagreements regarding search terms if I don't know what search terms they've used to collect the documents that they're going to give to us or some subset of that that they're going to give to us. So I think that I would like to have them directed to do that and that we be required, both of us, to meet and confer regarding that and report back to the Court in some period of time, 30 days, 45 days, and hopefully that will allow us to work towards this.

And the reason why this is important, it goes back to what you put in your order of June 18th modifying the stay. And what we heard a lot from Mr. Canfield is that what we're trying to do with this process is to set up much of the background work that is required so that when and if discovery

does begin in the case, we won't lose months of that discovery period trying to just set the groundwork for whose documents and how we're going to find them. That will have been done. And so this is all directed at using the time we have now while the motions to dismiss are pending to achieve that kind of progress and as best we can come to an agreement or, if not, identify disagreements and present them to your Honor.

That's all I had for today, so if you have any questions.

THE COURT: Mr. Pope.

MR. POPE: Your Honor, very little from me. I too listened today thoroughly and intently. As far as oral argument, we'll confer with the plaintiffs. November is fine for us. We'll get with Ms. Sewell on a date, and we appreciate your willingness to consider that.

With respect to ESI, we just met and conferred Monday. We're months behind what happened in the MDL. I gave -- Mr. Harrod recommended to work with him. If he wants an order that we have to meet and confer within the next 45 days on these issues, that's fine. I've got no objection to that. I want to meet and confer with him.

We've heard what the Court has said. We haven't taken any position on search terms. This is very fluid, very new. And so, again, the idea is to meet and confer, we'll meet and confer, but there's certainly no impasse now. And we

are months behind the impasse that we saw today, if there is such a thing in the other case. That's all I've got, your Honor.

THE COURT: Well, I'll reiterate what I said in my earlier orders in the securities litigation case, and that is I want to see progress made. And it doesn't sound like you're at an impasse, but between now and the next status conference I want some progress to be made. And that's really about all I'm going to say today. But I learned from *Androgel*. It was a painful lesson, and I don't want it to happen again if I can avoid it in Equifax. And that's about all I'm going to say more than what I've already said.

Anybody else want to say anything in the securities case? All right. Then I think that takes care of all three cases, and this status conference is concluded. Court is in recess until further order.

COURTROOM DEPUTY: All rise. Court is in recess.

(Whereupon, the proceedings were adjourned at 1:05 p.m.)

- - -

REPORTERS CERTIFICATE

I, Wynette C. Blathers, Official Court Reporter for the United States District Court for the Northern District of Georgia, with offices at Atlanta, do hereby certify:

That I reported on the Stenograph machine the proceedings held in open court on September 26, 2018, in the matter of IN RE: EQUIFAX, INC. CUSTOMER DATA SECURITY BREACH LITIGATION, Case Nos. 1:17-MD-2800-TWT, 1:17-CV-3463-TWT, 1:18-CV-317-TWT; that said proceedings in connection with the hearing were reduced to typewritten form by me; and that the foregoing transcript (Pages 1 through 67) is a true and accurate record of the proceedings.

This the 27th day of September, 2018.

/s/ Wynette C. Blathers, RMR, CRR
Official Court Reporter